UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

TIMOTHY LEAVITT,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 98-328-P-C***
	)	
KENNETH S. APFEL,	***)***	
Commissioner of Social Security,	***)***	
	)	
Defendant	***)***	

REPORT AND RECOMMENDED DECISION[1]

This Social Security Disability ("SSD") appeal raises the question whether the commissioner erred in finding that the plaintiff could return to his past relevant work. I recommend that the court affirm the commissioner's denial of benefits.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs*., 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff met the disability insured requirements of the Social Security Act on September 1, 1993, the alleged date of onset of his disability, and remained

[1] This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted his administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which he seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on May 7, 1999 pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

insured through at least December 31, 1998, Finding 1, Record p. 16; that he had not engaged in substantial gainful activity since 1990, Finding 2, Record p. 16; that he suffered from traumatic blindness of the left eye, an impairment which was severe but which did not meet or equal the criteria of any of the impairments listed in Appendix I to Subpart P, 20 C.F.R. § 404, Finding 3, Record p. 16; that his alcohol disorder was in remission, *id*.; that his statements concerning his multiple subjective musculoskeletal and respiratory complaints and their impact on his ability to work were not entirely credible in light of the objective tests, his own description of his activities and life-style, the degree of medical treatment required, the reports of treating and examining practitioners, and discrepancies between his testimony and the documentary record, Findings 3 & 4, Record p. 16; that he lacked the residual functional capacity to lift and carry more than 50 pounds or more than 25 pounds on a regular basis, to work where exposed to environmental irritants, to climb in hazardous places, or to perform tasks requiring normal visual acuity, Finding 5, Record p. 16; that his past relevant work as an assembler, bindery worker, and mill worker/inspector did not require the performance of work functions precluded by his medically determinable impairments, Findings 7-8, Record p. 17; that his alcoholism was not a contributing factor material to the determination of disability, Finding 10, Record p. 17; and that he had not been under a disability as defined in the Social Security Act since January 1, 1997, when previously awarded benefits were terminated, Finding 9, Record p. 17. The Appeals Council declined to review the decision, Record pp. 3-4, making it the final decision of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs*., 869 F.2d 622, 623 (1st Cir. 1989).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health &*

Human Servs., 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 402 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

Analysis

The plaintiff challenges two aspects of the commissioner's decision. He contends (i) that the administrative law judge erroneously applied the testimony of the vocational expert to find that 31% of any and all jobs were unavailable to the plaintiff due to his blindness in one eye rather than requiring the vocational expert to conduct a job analysis of the plaintiff's former jobs to determine whether and how they would be affected by his blindness, and (ii) that the administrative law judge erred in failing to take into account his diminished grasp and lower extremity strength. Plaintiff's Statement of Errors (Docket No. 3) at 5. The denial of benefits was made at Step 4 of the sequential review process, where the burden of proof is on the claimant. 20 C.F.R. § 404.1520(e); *Bowen v. Yuckert*, 482 U.S. 137, 146 n.5 (1987).

I fail to see how an analysis by the vocational expert of the plaintiff's former work with respect to the effect of the blindness in his left eye could be required in this case, where the plaintiff performed those jobs with the same blindness in the left eye that he had at the time of hearing. Indeed, he has been blind in that eye since approximately the age of nine. Record pp. 75, 170, 200. He presented no evidence of any change in his vision in that eye since he stopped working in 1990.[2]

[2] At oral argument, the plaintiff's counsel suggested that the court could infer that whatever vision the plaintiff had in his left eye while he was employed had deteriorated thereafter from the fact (continued...)

Id. at 34. He cannot be incapable of returning to his past relevant work due to a physical condition that was present when he previously performed that work.[3] Under these circumstances, the plaintiff cannot possibly meet his burden to show that he cannot return to his former employment because of the blindness in his left eye. *See Santiago v. Secretary of Health & Human Servs*., 944 F.2d 1, 5 (1st Cir. 1991). Even if that were not the case, counsel for the commissioner pointed out at oral argument that the appendix to the *Dictionary of Occupational Titles* establishes that, for one of the plaintiff's previous relevant jobs (machine cloth examiner), depth perception, the lack of which is the basis, along with the lack of peripheral vision to the left, for the plaintiff's claims, is not required. *Dictionary of Occupational Titles* (U.S. Dep't of Labor, 4th ed. rev. 1991), Appendix § 689.685-038. This entry also suggests that the lack of peripheral vision is irrelevant. *Id*. ("Field of Vision: N - Not Present."). Either of these factors makes further discussion of this claim unnecessary.

To support his second claim, the plaintiff relies on the report of Paul Stucki, M.D., who examined him for the Maine Disability Determination Services on September 15, 1996. Record p. 208. Specifically, the plaintiff relies on Dr. Stucki's findings that his "[g]rasp strength on the right [was] 2.5/5 and on the left 3/5," Record p. 211, and that "[o]verall, [his] lower extremity strength bilaterally [was] almost 3/5," *id*. He contends that the medical advisor who testified at the hearing before the administrative law judge, William J. Hall, M.D., "conceded that these deficits involved

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[2](...continued)
that surgery was performed on that eye in 1992. To the contrary, it would be more reasonable, in the absence of any medical evidence to support such an inference, to conclude that the vision was improved by the surgery. However, due to the lack of medical evidence on the point, it is not possible for the court to draw either conclusion.

[3] Indeed, as recently as 1993, three years after he stopped working, the plaintiff's vision in his right eye was 20/20. Record p. 200.

a 40 to 50 percent shortfall 'for a man of his age.'" Plaintiff's Statement of Errors at 5. These deficits, the plaintiff argues, "necessarily implicate[]" his "ability to lift and carry and to stand for long periods of time" as required by the medium exertional level of his past relevant work. *Id.* However, Dr. Stucki placed no limits on the plaintiff's ability to lift and carry or to stand for long periods of time; he simply reported the plaintiff's own statements on these points. Record p. 212. Dr. Hall rejected Dr. Stucki's specific findings on grasp strength and lower extremity strength, stating that they were not significant, that they were estimates not done with a measuring device, that he could draw no conclusion from the findings because they were "so subjective" and "the differences are so minimal," that "[t]here's no way to know how extensive his muscle testing was with regard to either lower extremity," and that "there's no way to know what [Dr. Stucki is] referring to" with respect to the lower extremity figures. *Id*. at 59-60.

A residual functional capacity ("RFC") assessment by a consulting physician dated September 18, 1996, limits occasional lifting to 50 pounds, frequent lifting to 25 pounds, and standing and/or walking to about six hours in an eight hour workday. *Id*. at 140-41, 147. There is no other medical evidence in the record to support the plaintiff's testimony that he cannot stand for more than an hour and that repetitive movements cause pain in his back and neck. *Id*. at 37-38, 40-41. The plaintiff himself told Dr. Stucki that he could lift 50 pounds. *Id*. at 212. There is simply nothing in this record to support a finding that the plaintiff could not meet the lifting and carrying standards of a medium exertional level. 20 C.F.R. § 404.1567(c). *See also* 42 U.S.C. § 423(d)(5)(A); 20 C.F.R. § 404.1528(a) (claimant's statements alone not enough to establish existence of a physical impairment).

With respect to the plaintiff's testimony concerning his inability to stand for more than one

hour at a time, even if the court could make the unlikely inferential leap from Dr. Stucki's finding of a 40% decrease in the plaintiff's "lower extremity strength" to a conclusion (without benefit of medical testimony) that this decreased strength necessarily meant a decreased ability to stand for extended periods of time,[4] *but see Manso-Pizarro*, 76 F.3d at 17 (administrative law judge not qualified to interpret raw medical data), the fact that Dr. Stucki provides no information concerning the testing by which his 3/5 figure was derived means that the administrative law judge was free to reject that evidence, based on Dr. Hall's testimony. 20 C.F.R. §§ 404.1527(d)(3) ("The more a medical source presents relevant evidence to support an opinion, particularly medical signs and laboratory findings, the more weight we will give that opinion."), 404.1528(b) (signs must be shown by "medically acceptable clinical diagnostic techniques"). Dr. Hall responded "no" to the following question:

> Is there anything that you found objective in the evidence which would reduce a residual functional capacity here which would limit his physical activities . . . or functioning?

Record p. 53. In contrast, Dr. Stucki does not tie his examination findings to any opinion concerning the plaintiff's residual functional capacity. *See Rosado v. Secretary of Health & Human Servs*., 807 F.2d 292, 293 (1st Cir. 1986) (medical findings unrelated by physician to specific residual functional capabilities not helpful to administrative law judge in assessing claimant's work capacity). It is also significant that Dr. Stucki, while discussing the plaintiff's blindness, shoulder pain, and alcohol

[4] Courts have differed on the question whether an inability to stand for fewer than six hours in a work day is inconsistent with a capacity for work at the medium exertional level. *E.g., Mills v. Sullivan*, 804 F.Supp. 1048, 1051, 1057 (N.D.Ill. 1992) (upholding finding that claimant could perform work at medium level despite medical report that claimant could not stand for more than two hours at a time); *Stang v. Sullivan*, 1989 WL 159351 (D. Kan. Dec. 28, 1989), at *6 (lack of evidence that claimant could stand for six of eight hours makes finding of capacity for medium work unsupportable).

abuse as possible impairments, does not mention the decreased strength he observed in the plaintiff's lower extremities as a possible impairment. Record p. 212.

Resolution of conflicts in the medical evidence is a matter for the commissioner, not the courts, to determine. *Lizotte v. Secretary of Health & Human Servs*., 654 F.2d 127, 130 (1st Cir. 1981). To the extent that the medical advisor's conclusion could be construed as conflicting with the report of Dr. Stucki, therefore, the administrative law judge's decision to rely on Dr. Hall's testimony cannot provide a basis for overturning his conclusions. *See, e.g., Dudley v. Secretary of Health & Human Servs*., 816 F.2d 792, 793-94 (1st Cir. 1987) (upholding reliance of administrative law judge on testimony of medical advisor that contradicted some findings in other physicians' reports). In fact, there is no medical evidence in this record to support the plaintiff's testimony concerning the limits on his ability to stand. Even in the absence of specific medical evidence contradicting the plaintiff's testimony on this point, the administrative law judge was entitled to reject it. *See Rodriguez Pagan v. Secretary of Health & Human Servs*., 819 F.2d 1, 3-4 (1st Cir. 1987) (claimant introduced no medical evidence to support claim of high blood pressure and only "vague and conclusory findings" from non-psychiatrists about alleged severe nervous condition; commissioner held justified in discounting both allegations). Accordingly, the commissioner's decision on this issue must be upheld.

Conclusion

For the foregoing reasons, I recommend that the commissioner's decision be **AFFIRMED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 12th day of May, 1999.

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David M. Cohen
United States Magistrate Judge